DOCUMENT RESUME

ED 303 861 EA 020 662

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TITLE The Right of Privacy of Public School Employees.
PUB DATE 9 Feb 89
NOTE 30p.
PUB TYPE Viewpoints (120) -- Legal/Legislative/Regulatory Materials (090) -- Information Analyses (070)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Civil Liberties; *Constitutional Law; *Court Litigation; Elementary Secondary Education; Employer Employee Relationship; Legal Responsibility; *Privacy; School Law; Search and Seizure; Teacher Behavior; Teacher Discipline; Teacher Responsibility; *Teacher Rights; Torts
IDENTIFIERS Supreme Court; United States Constitution

ABSTRACT

A nationwide controversy over the right of privacy has arisen as a result of companies probing into their workers' habits and health through such means as mandatory drug tests, electronic databases, and lie detector tests. The legal claims arising from these civil suits against employers for invasion of privacy have established precedents that are now being applied to schools and their personnel. These latter cases are reviewed in this paper. It begins with a historical background on the legal right of privacy, starting with Hebrew and Roman law, and moving through European legal concepts to the United Nations covenant on human rights and the American experience from 1890 to the present. The next section discusses constitutional bases for the right of privacy, deriving from Supreme Court cases that interpret the 1st, 4th, 5th, 9th, and 14th Amendments. The following section then specifically addresses privacy concerns for educators. The tradition of the teacher as exemplar for behavior standards is first reviewed, followed by a discussion of the current view that if a teacher is to be disciplined for private conduct, there must be a connection between the act and his or her role as an effective teacher. Cases are reviewed that construe various aspects of this standard. The final section addresses four areas of future privacy concerns for educators: (1) drug testing; (2) search of employees' desks and files; (3) the use of audiotape recorders in schools; and (4) the schools and children with AIDS. The Ninth Amendment, allowing for implicit rights not explicitly recognized in the Bill of Rights, suggests that other rights may yet surface. Footnotes are included. (TE)

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THE RIGHT OF PRIVACY OF PUBLIC SCHOOL EMPLOYEES

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February 9, 1989

EA 020 662

THE RIGHT OF PRIVACY

Introduction

The right of privacy, Supreme Court Justice Louis D. Brandeis wrote in 1928, is "the right to be let alone--the most comprehensive of rights and the right most valued by civilized men."[1] Brandeis was referring to the Fourth Amendment's guarantee against "illegal searches and seizures" by government. Today, Americans are asserting the "right to be let alone" by a different adversary: their employers. A nationwide controversy is erupting as companies probe deeper into workers' habits and health.

Unlike during past labor disputes, workers are mounting no strikes over the privacy issue. Today's combat involves lawsuits, huge jury awards, and demands for leave-me-alone legislation. Individual employees and unions are filling court dockets with challenges to random drug-testing. AIDS patients are suing employers for breach of confidentiality when co-workers learn about their condition. Employee advocates are demanding limits on electronic and telephone eavesdropping. And concern is growing over the potential for employers to delve into electronic data bases that collect the tiniest pieces of an employee's lifestyle under one neat label - the Social Security number.

The protests are being heard. Both the United States Senate and the House of Representatives have recently passed

bills restricting lie detector tests by private companies. Declares Paul Saffo, an expert on information technologies at the Institute for the Future: "After health care, privacy in the workplace may be the most important social issue in the 1990's."[2]

Further evidence of the extent of the current public interest in the right of privacy was shown in the rejection by the U.S. Senate of Robert Bork's nomination to the U.S. Supreme Court. This was due in part to his views on major privacy cases.

About three-fourths of all United States Jurisdictions have accepted the right of privacy as a basis for a civil claim for tortions injury, and many state legislatures as well as the U.S. Congress have enacted statutes protecting it. It has been the basis for a wide variety of claims, from the right to have an abortion to preventing the use of one's name or picture in a business promotion. These instances have little relation to schools but the concept of a legally protected right of privacy is being applied to a growing number of situations, and some have involved schools and their personnel. These will be the focus of this paper.

Historical Background

According to Hofstadter and Horowitz, the earliest intimation of a legal right of privacy is found in Jewish law, in the rule of the "Mishnah" (a compilation of the oral law of ancient Israel collected around 200 A.D. which constitutes the core of the "Talmud").[3] There we read that "....if one builds a wall opposite his neighbor's windows, whether it is higher or lower than theirs....it may not be within four cubits." The "Talmud" explains the reason: "That he should not peer and look into his house."[4] In his monumental restatement of Jewish law written in 1180, Maimonides declares explicitly that "the harm of being seen in privacy is a legal wrong."[5]

In Roman law "injuria" meant any "willful disregard of another's personality; in Greek law "Contumelia" was "every infringement of the personality of another....injury to honor, the insult, being the essential point, not the injury to the body."[6] In modern Europe also there was and still is much respectable authority for the doctrine that any unauthorized invasion to the privacy of another is prima facie an actionable wrong.[7] In German law, "Persönlichkeitsrect" comprehends the principle of the right of one's personality and is "on the whole considerable" in advance of the Anglo-American law in this question."[8] In French law, the right of privacy is widely recognized, though no special name for it has become generally accepted.[9] In England, too, notwithstanding some court decisions to the contrary, respectable scholarly opinion contends that

there does, or at all events should, exist a common law right of privacy.[10]

In the international arena, the General Assembly of the United Nations took cognizance of the right of "privacy" at the Regular Session of 1960. Its Third Committee as part of a draft of "International Covenants on Human Rights" formulated the right in the following language:

"1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."[11]

The American Experience: A Twentieth Century Tort

Prior to 1890 the right of privacy was not well established in American law.[12] In December of that year there appeared a law review article by two Boston lawyers, Samuel Warren and Louis Brandeis, entitled "The Right to Privacy" which changed this situation dramatically.[13] This article "enjoys the unique distinction of having synthesized at one stroke a whole new category of legal rights and of having initiated a new field of jurisprudence."[14] Prosser states that the article has come to be regarded as the outstanding example of the influence of legal periodicals upon the American law.[15]

Warren and Brandeis traced the historical expansion of rights, pointing out that the principle that the individual shall have full protection in person and in property is as old as the common law. In very early times, the law gave a

remedy only for physical interference with life or property. Later there came a recognition of man's spiritual nature, of his feeling and his intellect. Gradually the scope of these legal rights broadened. This development of the law was inevitable, Warren and Brandeis maintained. The increased intellectual and emotional life which came with the advance of civilization made it clear that only part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions and sensations demanded legal recognition.[16]

After examining over 300 cases on invasion of privacy, Prosser concludes that instead of a single tort, a complex of four different torts is involved.

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
2. Public disclosure of embarrassing facts about the plaintiff.
3. Publicity which places the plaintiff in a "false light" in the public eye.
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[17]

Constitutional Bases for Privacy

No general right of the individual to control the disclosure of information about himself has explicit constitutional status, but various provisions of the United States Constitution limit state and federal government activities affecting the individual's disclosural privacy. The Supreme Court has

interpreted the First Amendment's prohibition of laws abridging freedom of speech and the right of assembly to include a right of "associational privacy."

The chilling effect on free expression from forced disclosure of the names of those advocating unpopular beliefs led the Court to recognize that, in many curcumstances, privacy in one's associations is indispensable to freedom of association. In other cases the Court has upheld the right to anonymity in public expression. These decisions make it clear that the Constitution protects the individual from compelled disclosure of information about his exercise of First Amendment freedoms.

The Fifth Amendment privilege against self-incrimination also protects disclosural privacy by preventing the government from compelling testimony from an individual for use in his criminal prosecution. It does not, however, forbid compulsion of testimony where such testimony is not incriminating or where immunity from prosecution is granted.

The Fourth Amendment, which protects the individual against unreasonable searches and seizures, limits the government's right to "search an individual without his consent when he has a reasonable expectation of privacy." The individual, however, must submit to government intrusions which the courts find reasonable. Physical intrusions by government agents into a person's home require a warrant or probable cause.

A fundamental personal right to privacy is protected by substantive due process under the Fourteenth Amendment

and is a fundamental right recognized by this amendment.

The Ninth Amendment had been mentioned infrequently in the decisions of the Supreme Court until it became the subject of some exegesis by several of the justices in Griswold v. Connecticut.[18] There an anticontraceptive statute was voided as an infringement of the right of marital privacy. Justice Douglas, writing the opinion of the Court, asserted that the "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[19] Thus, while privacy is nowhere mentioned, it is one of the values served and protected by the First Amendment, through its protection of associational rights, by the Third, the Fourth, and the Fifth, and Justice Douglas recurred to the text of the Ninth Amendment, apparently to support the thought that these penumbral rights are protected by one amendment or a complex of amendments despite the absence of a specific reference.

Justice Goldberg, concurring, devoted several pages to the Ninth Amendment.[20] His thesis is that "The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.[21]

It is clear that the right of privacy protects individual decisions concerning marriage, procreation, contraception, abortion, and family relationships--and that any governmental rights "may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake."[22] However, the "outer limits" of the right of privacy have not been established. Development of this area of the law has proceeded on almost a case-by-case basis, and there are still other fundamental personal liberties besides those involved in past Supreme Court decisions that are protected by the right of privacy.[23]

A modern role for the Ninth Amendment was established in Griswald v. Connecticut, as discussed above. In Griswald the Court invalidated a Connecticut statute prohibiting the use of contraceptives, at least when applied to married persons. Justice Douglas, writing for the plurality, recognized a right of privacy that emanated from the penumbras of various express guarantees contained in the Bill of Rights and incorporated in the due process clause of the Fourteenth Amendment. He held that this right of privacy was clearly violated by a state's prohibition of the use of contraceptives by married couples. Justice Douglas cited the First, Third, Fifth, and Ninth Amendments in a paragraph examining the specific provisions of the Bill of Rights that in his view created "zones of privacy."[24]

In Roe v. Wade[25] the Court described the right of privacy as "founded on the Fourteenth Amendment's concept of personal

liberty." The opinion of Roe cites previous decisions of the Court recognizing "that a right of personal privacy, or a guarantee of certain areas of zones of privacy, does exist under the Constitution." These decisions have applied the Constitutional guarantee of personal privacy to activities relating to marriage, procreation, contraception, child-rearing, and the home.

In Katz v. Unites States[26] the Supreme Court held that the Fourth Amendment, which protects the individual against unreasonable search and seizure, limits the government's right to "attach an electronic listening and recording device to an individual's telephone without a warrant or without his consent when he has a reasonable expectation of privacy."

In Silverman v. United States[27] the Supreme Court has made it clear that the "Fourth Amendment gives a man the right to retreat into his own home and there be free from unreasonable government intrusion" in ruling unconstitutional the use of a "spike mike" to eavesdrop on a private home.

In N.A.A.C.P. v. Alabama[28] the Supreme Court declared an Alabama statute requiring the NAACP to provide the state with its membership list an unconstitutional impairment of the right of association. The Court noted that past disclosure under the statute had subjected members to "economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility." In these circumstances absent an overriding and compelling state interest, the disclosure requirement was held an unconstitutional price to pay for group association.[29]

In a five to four decision the Supreme Court held that the due process clause of the Fourteenth Amendment does not confer a fundamental right of homosexuals to engage in consensual sodomy even in the privacy of their own homes.[30] In his dissent Justice Blackmun disagreed with the Court's refusal to consider whether Georgia's sodomy law violates the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment, but most emphatically objected to the majority's refusal to apply the Fourth Amendment.[31]

Privacy Concerns for Educators

The Teacher as Exemplar

Since the early history of this country, the public has been far more restrictive in its expectation for the conduct of teachers than that of the average lay citizen. The public has typically held the view that the teacher should be an exemplar; that is, he should be a model for his students and meets the very highest standards in his personal conduct. Delon cites several studies and reports illustrating this.[32] The public was especially critical of teachers during the first half of the nineteenth century when it evoked the most rigid moral and religious standards. In 1841 an annual report of the board of education in Boston expressed the necessity for teachers to set examples for pupils in "deportment, dress, conversation, and all personal habits."[33]

Several incidents are cited from the midnineteenth century in which teachers were reprimanded, dismissed, fined,

imprisoned, and even subjected to mob harassment for real or imagined violations of prevailing public standards.[34]

By 1900, Arkansas examiners were charged not to license "any person who is given to profanity, drunkenness, gambling, licentiousness or other demoralizing vices, or who does not believe in the existence of a Supreme Being."[35]

The beginnings of a more liberal attitude toward teacher conduct accompanied a relaxation of moral standards by society in general during World War I. However, a doctoral dissertation completed in 1939 at George Peabody College for Teachers, provided little evidence of an immediate turn to permissiveness with respect to teacher behavior.[36] In fact, rural communities were still quite restrictive through the 1930's. Many teachers had very little freedom in their personal lives until the enactment of statewide tenure laws.[37] For example, in one instance, the dismissal of a teacher who had been drinking beer, playing a pinball machine, and shaking dice for drinks in a public restaurant in front of students, was upheld by the courts.[38]

By 1950, community pressures had gradually decreased. In a study conducted in Missouri, 75 percent of the teachers who responded felt no pressure against dancing, smoking, or card playing. Yet 58 percent responded that social drinking was "frowned on" by the community or the administration, and 20 percent said they found opposition to their participation open to other citizens.[39]

Koenig, in a 1968 article on teacher immorality and misconduct, identified the various meanings ascribed to teacher "immorality" and "misconduct", and closed the discussion with

the following recommendation:

> For the teacher who would avoid dismissal on the grounds of immorality or misconduct... guidelines would include the avoidance of illicit sexual activity; the avoidance of actions which might cast doubt on either character or reputation; a thorough knowledge of the community in which service is being performed; and a readiness to forfeit a certain degree of personal independence and freedom of action...[40]

The exemplar view was reflected in a 1979 Supreme Court statement that "a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values."[41] As Reutter points out the courts over the years have been in agreement with this statement and have expected a teacher's character and conduct to be above those of the average person not working in so sensitive a relationship as that of teacher and student.[42]

Nexus View

Today there is a trend toward more freedom in teachers' personal lives than has been true in the past. If a teacher is to be disciplined for an act, that act must somehow reduce the teacher's occupational effectiveness. Stated another way, there must be a connection ("nexus") between the act and the role of effective teacher, the latter being impaired or destroyed as a consequence of the former.

Whether a teacher's private conduct is subject to disciplinary action by a school board depends upon a number of factors, according to the Supreme Court of California. The court listed "the likelihood that the conduct may have adversely affected the students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers."[43]

According to many courts, a teacher's private life is protected from employer interference unless an adverse impact on the school can be shown. For example, the Eighth Circuit Court affirmed the district court's holding for the teacher in a Nebraska case, Fisher v. Snyder.[44] The board had dismissed the teacher for immorality because on several occasions she had permitted young men, friends of her son, to stay overnight in her one-bedroom apartment. While recognizing the board's right to inquire into the teacher's associations, the court ruled that such inquiries did not provide sufficient evidence of misconduct to justify infringement of the teacher's rights.

An Illinois teacher, married for only one month but eight and one-half months pregnant, was dismissed for immorality.

The appellate court, following the nexus theory, affirmed the trial court ruling that this charge is a cause for dismissal only when it can be shown that the teacher's conduct produces harm to the pupils, faculty or the school. Private conduct of a teacher is a proper concern of those who employ him, the court held, only when it mars him as a teacher.[45]

An Arizona case arose from a visit to a bar by a male teacher and a female companion. During the evening two men annoyed the female. In the parking lot afterwards the teacher had an altercation with the men during which weapons were drawn. The teacher entered a plea of guilty to disturbing the peace, being under the influence of intoxicants, attempting to fight, and displaying a gun. The teacher, who was on tenure, was given a hearing by the board and then dismissed. The discharge was upheld on the basis of a school board regulation dealing with personal conduct which stated that "teachers will adhere to any reasonable pattern of behavior accepted by the community for professional persons."[46]

In a case where a teacher's private communications to a former student became public knowledge through the actions of a third party, an Ohio court overturned the teacher's dismissal. Letters written by the teacher to his former pupil fell into the hands of his mother, who turned them over to the police. Newspapers wrote stories about the letters, which, in the words of the court, contained "language which many adults would find gross, vulgar and offensive and which some 18-year-old males would find unsurprising and fairly routine."

The court took into account the teacher's excellent teaching record, and the fact that the writing of the letters did not adversely affect the welfare of the school community until the public disclosures, which were not the result of any misconduct on the teacher's part.[47]

In an unusual case from Massachusetts, the courts upheld dismissal of a sixth-grade teacher for conduct unbecoming a teacher by displaying and fondling in public view a dress mannequin. Although the activities took place on the teacher's own property, the District Court rejected his claim that he was denied his rights of privacy.

> The court is not impressed by plaintiff's argument that the defendant's actions constituted an unconstitutional invasion of his right to privacy. However convincing his argument may be that private sexual conduct is protected from governmental intrusion, the evidence in this case is ample that on various occasions the conduct was public in nature or at least was carried on with such reckless disregard of whether or not he was observed that it lost whatever private character it might have had.[48]

The First Circuit Court of Appeals upheld the lower court decision.[49]

Nexus to performance of professional work of an assistant superintendent who was involved in an "amorous relationship" with a married woman was held to be satisfactorily shown by his unexplained absences from his office and from sessions at

conventions. Apparently he met with her three or four times a week during his assigned working hours. The court said that his failure to fulfill his duties cannot be defended by asserting that the conduct that interfered with job performance is private![50]

Purely private association is protected by the First Amendment. A federal court ruled that a qualified teaching applicant cannot be denied a job because she was married to a civil rights activist who helped organize a local school boycott.[51] Nor can a school district refuse to reemploy a nontenure teacher because of her divorce. The Sixth Circuit Court of Appeals held that "matters involving marriage and family relationships involve privacy rights that are constitutionally protected."[52]

However, these constitutional rights must be balanced against the legitimate interests of the school district. One such interest is in avoiding conflicts of interest. Thus, the Eighth Circuit Court of Appeals upheld the nonrenewal of the contract of a high school principal who married a teacher in his school in violation of a school board ban on administrator-teacher marriages. The court ruled that the policy does not deny people the right to marry; it only prohibits the employment of married couples in administrator-teacher situtations for the laudatory purpose of preventing conflicts of interest and favoritism.[53]

If a teacher's marital problems spill over into the classroom, they are no longer a matter of purely personal concern. A federal court upheld the nonrenewal of the contract

of a teacher because of serious personal problems with his wife, who upon several occasions had assaulted him with deadly weapons and had at least once entered his classroom and threatened his life. The court said that his right to marry whom he wishes does not give him the right to engage in domestic altercations in the classroom of a public school.[54]

When a teacher's private associations are a matter of public knowledge, the right of privacy does not prevent a school board from seeking sanctions if the associations are detrimental to the school. The California courts upheld revocation of a teacher's certificate for active membership in a swingers club that promotes diverse sexual activity among its members in the semipublic atmosphere of a club party.[55]

In a case involving a teacher convicted of shoplifting off the school premises and outside of work time the high court of West Virginia said the conduct of a teacher ceases to be a private matter and may justify dismissal if the conduct directly affects the performance of the teacher or if, without the contribution of school officials, the conduct becomes the subject of such notoriety as to significantly impair the capability of the teacher to discharge his duties.[56]

The Supreme Court of Kentucky used similar reasoning in the case of two brothers, who were tenured high school teachers who smoked marijuana in the privacy of their own apartment with two 15 year-old girls. The court said that not all private shortcomings can be disciplined, but those that are

related to teachers' involvement or example to the school community can be. The dismissal of the teachers, despite their records of satisfactory teaching performance was upheld.[57]

There is no doubt that boards of education have implied, if not express, authority to adopt reasonable rules and regulations governing eligibility for employment and regulating that employment. If local policies are not contrary to state-adopted ones, or do not infringe upon federal or state constitutional or statutory rights of employees, the test of their validity is their reasonableness in terms of their purposes.[58]

Rules that are valid in general, however, may be applied unconstitutionally in specific situations. The Fifth Circuit Court of Appeals made this point and also summarized case law on privacy in a 1981 case.[59] A teacher whose baby required breastfeeding was unable to do so while retaining her position, because one rule forbade her to leave the premises during the school day and another prohibited her from having her child on school grounds during that day.

The Circuit Court first considered whether the teacher's interest in nurturing her child by breastfeeding is constitutionally protected. The court held that it is. But it also recognized that the school board has legitimate interests in restricting the exercise of this right during the school day. It remanded the case back to the district court to determine at trial whether these interests are strong enough to justify the school board's regulations.

In an excellent review of case law, the Fifth Circuit Court of Appeals said that the Constitution protects citizens' freedom of personal choice in some matters of marriage and family life. Among these protected liberties are individual decisions respecting marriage, procreation, contraception, abortion, and family relationships. These protected interests have been described as rights of personal privacy or as "fundamental" personal liberties. These rights derive from various constitutional provisions, and their existence is now an established part of our constitutional jurisprudence.[60]

Future Privacy Concerns for Educators

The trend in court cases this century has been toward greater freedom in the personal lives of educators. The concept of teacher as role model has not completely disappeared; however, the courts are deciding cases on their impact, rather than strictly on society's norms. A connection, or nexus, between one's conduct and performance on the job is the basis for today's decisions and will, in all probability, continue to be in the near future.

With this in mind, there are four areas of privacy concerns that might be of interest to educators in the future.

Drug Testing

Mandatory drug testing of public school employees is now and promises in the future to continue to be a controversial subject. In determining the legality of mandatory drug testing, the courts must balance intrusion of individual's Fourth

Amendment interests against the governmental interests involved, such as the need to maintain a safe and efficient school environment. The Court of Appeals for the District of Columbia has said:

> It is not unreasonable to require drug testing as part of routine, reasonably required, employment-related medical examination of school district employees whose duties involve direct contact with young school children and their physical safety if there is a clear nexus between the tests and the employer's legitimate safety concern.[61]

This decision has been appealed to the Supreme Court.[62] If review is granted, the status of drug testing may be clarified.

Search of Employees Desks and Files

Search of students in public schools has long been a matter of widespread litigation. Search of teachers and their effects has been much less frequent. However, there are indications that this situation may change.

In one of the few cases dealing directly with this topic a federal appeals court held that the search by a school board member of a guidance counselor's desk in the evening, having gained access to the locked office by means of a janitor's passkey, was a violation of the counselor's Fourth Amendment rights and that the counselor was entitled to sue for damages under civil rights statutes.[63]

The reason to expect greater litigation in the future lies in Justice O'Connor's plurality opinion in a 1987 case. After recognizing that searches and seizures by government employers of the private property of their employees are subject to Fourth Amendment restraints and that expectations of privacy in one's place of work have deep roots in the history of the amendment, Justice O'Connor wrote that the realities of the workplace may make some public employees' expectations of privacy unreasonable when the intrusion is by a supervisor rather than a law enforcement official. Some government offices, she stated, are so open to fellow employees or the public that no expectation of privacy is reasonable. "Given the great variety of work environments in the public sector," Justice O'Connor continued, "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."[64] Three justices joined Justice O'Connor, one concurred, and four dissented.

The Use of Audiotape Recorders in Schools

While no such cases have been reported involving school personnel, they are increasing in other contexts as the technology for receiving and recording conversations improves. Thus far, the greatest number of cases on the issue have been criminal in nature, where the issue was whether or not recorded conversations were admissible as evidence.[65] Surreptitious use of electronic devices by a principal to monitor a teacher's classes is technologically possible, but ethically

and legally problematical. The recording of a conversation without the permission (or even the knowledge) of one of the parties is possible. It may or may not be legally actionable, depending upon the use that is made of the recording.[66] These situations could involve principals and teachers, principals and students or their parents, or principals and other administrators.

The Schools and Children with AIDS

The spread of Acquired Immune Deficiency Syndrome (AIDS) poses additional problems for school personnel. In order to fulfill their responsibilities to protect the health and safety of all children under their charge, school officials may need to know which children carry the HTLV-111 virus and might infect other students.

While there have been no reported cases of AIDS being transmitted in a school setting, both the U.S. Public Health Service and the American Academy of Pediatrics have advised that "children with AIDS who lack control over bodily functions, have open wounds or cuts, or display behavior such as biting, should receive individualized instruction outside the classroom."[67] Additionally, the school may need to place limitations on the activities in which a child with AIDS may participate - such as no contact sports or no activities in which the child's conduct might endanger the other students.

School districts must take steps to ensure that information about students with AIDS is kept confidential. The Education of the Handicapped Act and the Family Educational Rights and Privacy Act both prohibit the unconsented disclosure of personally identifiable information about students.

The disclosure of children with AIDS within the school system is viewed by the courts, the health officials, and the health agencies as counterproductive and not always necessary. The argument put forth is that the disclosure is likely to produce enormous harm as it is "unrealistic to expect that, in the current atmosphere, teachers (or principals or superintendents) will be able to adhere to the strict confidentiality required. And once the identities of the children with AIDS become more widely known, they are likely to be ostracized."[68]

The problem for school officials therefore becomes one of providing information about children with AIDS to those persons who need it and at the same time assuring that the information will not become public knowledge.

The Use of the Ninth Amendment in Privacy Cases

Presently, most privacy cases have been arqued as a violation of First, Fourth, or Fourteenth Amendment rights. More frequently, however, the Ninth Amendment has been used to guarantee privacy as one of the unenumerated rights of the Bill of Rights. This has led one judge to imply that the Ninth Amendment is a "bottomless pit" of rights that might be pulled out as the need arises. It could also mean that there are other possible as yet unrecognized rights that may

yet surface, much as the right of privacy did at the turn of this century. This is something that only time will tell.

FOOTNOTES

1. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting.

2. Privacy, 3044 BUSINESS WEEK 61 (March 28, 1988).

3. S. Hofstadter and G. Horowitz, THE RIGHT TO PRIVACY 1 (1964).

4. Id. at 9.

5. Id.

6. Id.

7. Id. at 10.

8. Id.

9. Id. at 11.

10. Id. at 2.

11. Id. at 3.

12. An exception is the physical intrusion into one's home by police. The Fourth Amendment's protection against this was well-recognized. As early as 1886 the freedom from unreasonable government intrusion in one's home was described by the Supreme Court as "of the very essence of constitutional liberty and security." Boyd v. United States, 116 U.S. 616, 630 (1886).

13. Warren and Brandeis, The Right to Privacy, 4 HARV. L. REV. 193 (1890). Brandeis, of course, later became a distinguished Justice of the Supreme Court of the United States. It is he who is quoted in supra, note 1.

14. 62 AM. JUR. 2d Section 2.

15. Prosser, Privacy, 48 CALIF. L. REV. 383 (1960).

16. Warren and Brandeis, supra. Brandeis used virtually these same words in his dissent in Olmstead, supra.

17. Prosser, supra.

18. Griswold v. Connecticut, 381 U.S. 479 (1965).

19. Id. at 484.

20. Id. at 488-499.

21. Id. at 488.

22. Baker v. Wade, 553 F. Supp. 1121 (1982).

23. Id.

24. Griswold v. Connecticut, supra, at 484.

25. Roe v. Wade, 410 U.S. 113 (1973).

26. Katz v. United States, 389 U.S. 347 (1967).

27. Silverman v. United States, 365 U.S. 505 (1961).

28. N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

29. Id. at 462.

30. Bowers v. Hardwick, 478 U.S. 186 (1986).

31. Id. at 201. Blackmun, J. dissenting.

32. F. Delon, LEGAL CONTROLS ON TEACHER CONDUCT: TEACHER DISCIPLINE (1977). The studies referred to in notes 31-40 below are all cited by Delon at 2, 3, or 4.

33. W. Elsbree, THE AMERICAN TEACHER 296-297 (1939).

34. H. Beale, A HISTORY OF FREEDOM OF TEACHING IN AMERICAN SCHOOLS 3-11 (1941).

35. Elsbree, supra. note 31 at 355.

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